

PINE VILLAGE, INC.,	:	IN THE COURT OF COMMON PLEAS OF
	:	LYCOMING COUNTY, PENNSYLVANIA
Plaintiff	:	
	:	
vs.	:	NO. 02-00,732
	:	
H. GENE FEERRAR,	:	CIVIL ACTION – IN EQUITY
	:	
Defendant	:	POST-TRIAL MOTIONS

**Date: July 7, 2004**

**OPINION AND ORDER**

This Opinion and Order are filed in connection with the motions of the parties, filed following a non-jury equity trial and this Court’s Adjudication and Decree Nisi dated and filed June 4, 2004. A “Motion for Reconsideration of the Order of June 4, 2004” was filed by Defendant H. Gene Feerrar (hereafter “Feerrar”) on June 14, 2004. It was filed within the ten-day time limit for filing post-trial motions as provided by Pa. R.C.P. 227.1. Thereafter Plaintiff, Pine Village, Inc. (hereafter “Pine Village”) filed a “Motion by Plaintiff for Reconsideration, or, in the Alternative, Motion by Plaintiff for Post-Trial Relief” on June 22, 2004.

Initially there are some procedural matters involving the two motions that the Court must resolve. The first is to note under the equity rules the post-trial procedures of 227.1 apply to the June 4<sup>th</sup> adjudication Pa. R.C.P. 227.1 makes no reference or allowance for the Court to entertain a motion for reconsideration of its June 4<sup>th</sup> adjudication. Pa. R.C.P. 1522 would allow a petition for a rehearing in an equity case. In many ways the Motion for Reconsideration of Feerrar filed June 14<sup>th</sup> suggests that a rehearing is necessary in order that the Court can properly entertain evidence relating to the appropriate zoning provisions of the

Cummings Township Zoning Ordinance, particularly the side-yard setback as would apply to Feerrar's lot that is the subject of the litigation be made of record. The motion attached copies of the Ordinance asking that the Court "take judicial notice" of those ordinances but did not ask for a new hearing to introduce that evidence. Pine Village has objected to the Court taking such judicial notice and asserts this is an inappropriate attempt by Feerrar to put evidence into the record that was available at the time of the hearing. Pine Village argues that Feerrar's failure to provide this evidence or place the zoning matters at issue in the trial prevents it from appropriately refuting the contentions raised in Feerrar's Motion for Reconsideration.

The Pine Village motion filed June 22<sup>nd</sup> is beyond the ten-day post-trial limit imposed by Rule 227.1. Feerrar, therefore, argues it is untimely and must be dismissed. However, Pine Village asserts it is a timely post-trial motion because of Feerrar's Motion for Reconsideration is a post-trial motion and under Pa. R.C.P. 227.1(c), Pine Village is permitted to file its post-trial motion within ten days of the Feerrar filing.

The Court believes it is appropriate to treat Feerrar's June 4<sup>th</sup> filing as a post-trial motion under Pa. R.C.P. 227.1. Specifically at issue is the provision of the Court's Decree Nisi paragraph 5 which directed Feerrar to remove a shed and its attachments from its present encroachment upon Pine Village property to a point at least ten feet from the property line of Pine Village, not later than July 15, 2004. Essentially the Motion is a challenge to the sufficiency of the evidence to justify the distance of ten feet being the required removal distance for the shed.

Inasmuch as we have considered and found that the Feerrar motion for reconsideration filed June 14, 2004, was a post-trial motion under Pa. R.C.P. 227.1, it is also

appropriate for us to find that the Pine Village Motion for Reconsideration, or in the alternative, Motion for Post-Trial Relief filed June 22, 2004 is also filed timely under Pa. R.C.P. 227.1(c). The case of *Marzullo v. Stop-N-Go Food Stores*, 527 A.2d 550 (Pa. Super. 1987) cited in opposition to this by Feerrar is not controlling or instructive, as the reconsideration sought in that case, which involved a request to the court to reconsider a ruling to the preliminary objections. In *Marzullo* the court held that the filing of a motion to reconsider did not constitute a “plead over” allowed under Pa. R.C.P. 1028 where preliminary objections had been overruled, *Marzullo* holds that a petition for reconsideration for preliminary objections is not a pleading that would prevent the entry of a default judgment for failure to plead to a complaint. *Id.*, at 554.

It is also interesting to note that the court in *Marzullo* did not find any authority under the Civil Rules of Procedure, which would permit the filing of a motion to reconsider a court’s ruling on preliminary objections. This ruling certainly implied that a motion for reconsideration not filed in accordance with a court rule was of no effect whatsoever. Thus, under the reasoning of *Marzullo*, if Feerrar’s motion for reconsideration filed June 14<sup>th</sup> was not an effective post-trial motion, there would be no issues before the Court for consideration at this time. Nevertheless, the Court believes that despite its caption as referenced above, the Feerrar motion should be regarded as an inappropriately captioned post-trial motion that was timely filed and the Pine Village motion also timely filed.

The Court will now deal with the merits of each of the post-trial motions. A brief reference to the factual background and factual findings of this Court’s Decree Nisi

entered June 4, 2004 is necessary for the reader to have the full understanding of the basis for the entry of this Order.

Pine Village and Feerrar own adjoining properties in Cummings Township. A private right-of-way of Pine Village, referenced as Elder Lane, crosses the Feerrar property and leads to the Pine village property. Feerrar's property is actually two lots. A 5.65-acre lot lies to the west of Elder Lane. A 1.93-acre lot lies to the east of Elder Lane and is actually crossed by Elder Lane. Elder Lane was found to exist as a private right-of-way, 16 feet in width as it crossed Feerrar's property. The Court found that both of Feerrar's tracts were subject to subdivision-imposed restrictions requiring a building setback line of 50 feet from the centerline of Elder Lane. The Court also found that Pine Village had no standing to enforce those subdivision restrictions.

The Feerrar shed in question is approximately 12 feet by 20 feet long and was found to encroach upon the Pine Village property between 4.66 and 9.12 feet. In addition the shed had attachments that further encroached upon the Pine Village ground. The shed is located on the 1.93-acre tract of Feerrar east of Elder Lane. On the 5.65-acre tract west of Elder Lane Feerrar had constructed a garage, which the Court found encroached into Elder Lane. We also found the garage was constructed within a distance of 4.62 feet from the Pine Village property line which was in violation of the 10-foot side yard setback required by the Cummings Township Zoning Ordinance.

In September of 2000 Feerrar erected a metal gate across Elder Lane, which blocked Pine Village's access. The gate was locked and Pine Village was prevented from using the right-of-way across Elder Lane until a Court Order of June 10, 2003 directed that Feerrar

provide keys to the lock to Pine Village. Feerrar's gate was found to have been erected in an effort by Feerrar to force Pine Village to permit Feerrar to use a private drive across Pine Village's real estate. Because of the size, position, weight and operating requirements of the gate and its lack of serving a legitimate appropriate interest of Feerrar (specifically to promote the security interest of his property) the Court found that the gate of Feerrar was an unreasonable infringement upon Pine Village's easement rights in Elder Lane. The Court's Decree Nisi provides that Feerrar cannot close the gate between April 1<sup>st</sup> and November 30<sup>th</sup> of each year. Between December 1<sup>st</sup> and March 31<sup>st</sup> of the following year Feerrar can close and lock the gate but must open it whenever Pine Village notifies Feerrar it will be using Pine Village's claim for monetary charges arising out of the interference with its right-of-way.

**Feerrar's Motion**

Feerrar's motion of June 4<sup>th</sup> asserts Feerrar's belief that the Court intended by its Decree Nisi that Feerrar should remove the shed to a point that would be in compliance with the Cummings Township Setback Ordinance, which the Court improperly believed to be ten feet. This belief of Feerrar's is correct. It is also correct that the evidence at trial did not establish the applicable zoning provisions that apply to Feerrar's 1.93-acre lot where the shed is located. The testimony at trial was uncontroverted that Feerrar's 5.65-acre lot had a 10-foot side-yard setback requirement, as established by the Cummings Township Zoning Ordinance. After carefully reviewing its own notes of testimony the Court is satisfied that there was no testimony about the zoning requirements for the 1.93-acre tract. Perhaps they are the same as the 5.65-acre tract, perhaps they are different. The Court had intended that when Feerrar removed his shed from the Pine Village property it should be placed in a location that complies

with all applicable zoning and/or subdivision requirements. There was no other reasoning or evidence to support the 10-foot removal requirement. The 10-foot requirement was based upon an assumption the zoning ordinance required 10 feet as the minimum side yard and was not based upon any other evidentiary consideration. As the evidence is not sufficient to establish that the 10-foot setback of the zoning ordinance applies to Feerrar's 1.93-acre tract the Decree Nisi is in error and must be modified.

The Court also notes that while Pine Village does not have standing to enforce the subdivision restrictions which apply to Feerrar's property, this Court also has no intention of entering an order that would modify or affect those restrictions. Therefore, the Decree Nisi will be revised to provide that when Feerrar removes his shed for the Pine Village property, the shed's new location must conform to all applicable zoning and subdivision requirements.

**Pine Village's Motion**

The Pine Village Motion challenges this Court's denial of the award of monetary damages to Pine Village to which it is entitled as a result of being denied the right to use the Elder Lane right-of-way. The Motion also asserts that the Court must direct a complete removal of Feerrar's gate based upon the factual findings made by the Court.

The denial of monetary damages was set forth as #6 of the Court's Decree Nisi. In asserting its claim that the Decree Nisi should be modified to award it monetary damages Pine Village asserted in the Motion that, "The uncontradicted testimony is that this unlawful and malicious denial (of the use of the right-of-way) resulted in a total preclusion of Plaintiff's use of its property during certain times of the year and during inclement weather." Plaintiff's Motion filed June 22, 2004, paragraph 3. The Court's Adjudication at Finding of Fact 68 found

that Feerrar had erected the gate that obstructed Elder Lane and prevented Pine Village from exercising its easement rights in an effort to force Pine Village to permit him the right to use a roadway that crossed Pine Village's property. The gate was erected in September 2000. In November 2001 Pine Village's counsel wrote to Feerrar indicating that Pine Village would institute an equity action if Feerrar did not remove the gate. Adjudication, Finding of Fact, #79. The gate remained locked and blocking Pine Village's access until June 10, 2003, when the Court directed keys should be provided to Pine Village by Feerrar in response to Feerrar's request that the trial in the matter be postponed. In Finding of Fact #80, in the Adjudication, the Court determined that from the time the gate had been constructed until the keys were provided that Pine Village and its tenants traveled to the Pine Village property using a northern access road instead of Elder Lane. The northern access was certainly more difficult than using Elder Lane but not impossible. The Court also found that Pine Village carried on most of its normal uses during the period of time the gate was locked. Finding of Fact #81. Most significantly Pine Village did not lose any income from its rental properties or suffer any other loss of income. Finding of Fact #82. In discussing Pine Village's right to damages in the Adjudication, the Court noted that Feerrar's interference with the right-of-way to the extent it deprived Pine Village from the enjoyment of its property had a value recoverable as damages, but the Court found that the gate did not stop Pine Village from enjoying its property but rather made it more difficult. The Court did not receive sufficient credible evidence from which it could apply a monetary value to this increased difficulty.

This Court did not find credible the testimony of the principals of Pine Village nor others that they did not use the property because of the presence of the Feerrar gate. The

Pine Village efforts to improve its northern access were not done until after the institution of the lawsuit in 2002. The Court did not believe the improvement of the northern right-of-way was caused by the Feerrar gate erection. Although Pine Village asserts that it suffered substantial damages regarding the loss of the use of enjoyment of its property the Court did not accept this testimony in the face of the activities and use that Pine Village did make of its property. The Court was not able to ascertain any specific measurable damage that resulted from the increased distance, if any, of using the northern access or the longer length of time it would take to reach the Pine Village property. Perhaps if there had been testimony that, due to the lack of use of Elder Lane the rental income from the property had been reduced, such would have been an indication of a way to measure the monetary impact of the deprivation of access over Elder Lane. Again, however, the Court did not find the testimony of the Pine Village principals or their witnesses credible as would relate to the fact that it was an inability of using Elder Lane that prevented them from using their property. Certainly, Pine Village as any claimant, must take steps to mitigate their damages and it appears that Pine Village did so by making use of the northern access.

Pine Village also challenges this Court's determination as set forth in #4 of the Decree Nisi that permitted Feerrar to maintain the gate in its present location and shut and lock it between December 1<sup>st</sup> and the following March 31<sup>st</sup> of each year on the condition that he deliver appropriate keys and that he unlock and open the gate during the times Pine Village gives him notice that their property is being occupied. The issue of the removal of Feerrar's gate raised by Pine Village in its post-trial motion aptly relies upon this Court's introductory statement to its discussion of Feerrar's gate in the Adjudication at page 34, which stated that,



“This Court finds that under the circumstances and the facts of this case Feerrar’s gate must be removed.” Perhaps the Court should have more prudently added to its introductory statement, stating the gate must be removed, the words, “to the extent it constitutes an unreasonable obstruction of Pine Village’s easement rights.” In effect, the Court did add this qualification in the remainder of its discussion of the gate issue in the original Adjudication.

In the Adjudication the Court went through a lengthy discussion of the principles that govern the erection of gates across a right-of-way by the owner of the land, which is subject to the easement. That case law led the Court to the conclusion that the right of Feerrar to erect a gate across the right-of-way required a balancing of the respective property interests of he and Pine Village. The Court applied those principles to the facts of the case and opined in the Adjudication, at page 45, that, “In applying those principles of law to the circumstances of this case, it is clear to the Court that the Feerrar gate does constitute an unreasonable obstruction of the Pine Village easement.” In so finding, the Court stated it was very important that the Feerrar gate did not afford his property any protection or convenience and at the same time prevented Pine Village and its many guests and tenants from the normal use of their easement. *See* Adjudication at page 45.

Nevertheless, the Court did consider how best to correct this interference while still protecting the rights and interest of Feerrar as the landowner of the servient estate. In so doing the Court discussed and considered the fact that for the most part the usage made by Pine Village was on a spring, summer and fall seasonal basis, with very little usage of its property in the winter, at least as of this time. Feerrar’s property is also primarily used as a recreational residence as opposed to a main residence by Feerrar, although there was not a great deal of

testimony as to the frequency with which he would be at the property during winter months. The Court also considered that the typical winter snows could in fact be of such an extent as to make Feerrar's gate a potential security benefit to his property. The Court, in reaching this conclusion, considered the terrain of the properties and that while the non-snow months a four-wheel drive vehicle or even a conventional car for that matter could negotiate its way around the gate that in winter time circumnavigating the gate with a substantial amount of snow on the ground might be difficult even for a 4-wheel drive pick-up truck. Therefore, the gate would afford a benefit to Feerrar in the way of protection of vandalism and theft, would be effective exercise of his property rights in winter months. This would be unlike the situation that would exist at other times of the year when the gate could easily be bypassed as discussed in the original Adjudication.

Accordingly, in order to correct the wrongful interference of the right-of-way but still preserve the right of Feerrar to endeavor to protect his property the Court determined that the gate could remain in place but could not be closed or in any other way restrict Pine Village's use of Elder Lane from April 1<sup>st</sup> through November 30<sup>th</sup> of each year. In the winter months, when Pine Village would only be making an occasional use of its property, the Court believed and still does believe that requiring Feerrar to open the gate during the times Pine Village gives notice it is using the property between December 1<sup>st</sup> and the following March 31<sup>st</sup> to be appropriate. Requiring Feerrar to operate the gate, eliminates the difficulty of operation Pine Village encountered as described in the original Adjudication. The result is to permit Pine Village free use of Elder Lane while at the same time giving Feerrar the benefit of protection when either or both properties are unoccupied in winter months.

Accordingly, the Court does not intend to change the impact and the effect of paragraph #4 of its Decree Nisi. In reviewing that provision, however, the Court has become aware of the fact that there may be an ambiguity as to how and when Pine Village should give notice to Feerrar that the property of Pine Village is to be utilized between the dates of December 1<sup>st</sup> and March 31<sup>st</sup> of each year. This may be complicated by the fact that the Feerrar home is not Feerrar's principal residence. The Court recalls that he indicated his principal place of business was in the south central area of the state, perhaps Lancaster County. In this regard, the Court will direct by this Order that counsel for the parties should negotiate during the month of July in an attempt to fashion a manner of how such notice should be given in terms that both parties can agree upon. If an agreement is reached, a stipulated order should be submitted for approval not later than August 16<sup>th</sup>. If such an order is not submitted to the Court by August 16<sup>th</sup>, this Court will proceed with entering an order modifying the Decree Nisi by directing the manner and specifics as to procedures to be followed in the giving of that notice.

### **ORDER**

The post-trial motion of Feerrar filed June 4, 2004 is granted and paragraph #5 of the Decree Nisi of June 4, 2004 is amended to read as follows:

Defendant, H. Gene Feerrar, shall remove the shed and its attachments from their present encroachment upon the Pine Village property to a location that is not in violation of any zoning ordinance or deed/subdivision restriction.

The post-trial motion of Pine Village filed June 22, 2004 is denied and the June 4, 2004 Decree Nisi provisions of paragraph #4 and paragraph #6 will not be modified; provided, however, that as to paragraph #4 counsel for the parties shall negotiate during the

month of July in an attempt to fashion a manner of how notice to Feerrar by pine Village of its use of its property between December 1<sup>st</sup> and March 31<sup>st</sup> of the following year should be given in terms that both parties can agree upon. If an agreement is reached, a stipulated order should be submitted for approval not later than August 16<sup>th</sup>. If such an order is not submitted to the Court by August 16<sup>th</sup>, this Court will proceed with entering an order directing the manner and specifics as to procedures to be followed in the giving of that notice.

BY THE COURT,

William S. Kieser, Judge

cc: Joseph R. Musto, Esquire  
Michael J. Casale, Jr., Esquire  
Judges  
Christian J. Kalaus, Esquire  
Gary L. Weber, Esquire (Lycoming Reporter)